United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7321

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN and EULA LEE BLOWERS

Plaintiffs-Appellants

-vs-

ELISHA C. FREEDMAN, individually and as City Manager of the City of Rochester; THOMAS P. RYAN, JR., individually and as Mayor of the City of Rochester; THOMAS GOSNELL, individually and as President of Lawyers Cooperative Publishing Company; LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendants-Appellees

ON APPEAL FROM THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 74-522

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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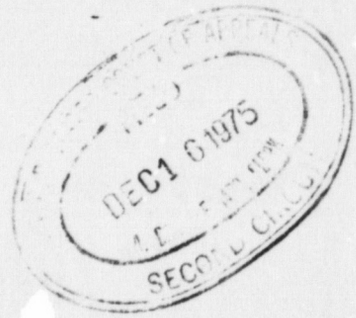

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TABLE OF AUTHORITIES CITED

Statutory and Other References

ARGUMENT

"One native son put into eloquent words his feeling for the dethroned Messenger of the Gods. That loyal friend of Mercury is Attorney J. Boyd Mullan, former president of the New York State Bar Association and son of the late John B. Mullan, state senator and postmaster of Rochester.

Here, in part is what Boyd Mullan wrote:

> 'All my life I have been fascinated by the statue of Mercury.
>
> I suppose that is due in part to a sense of provincial pride. When my college classmates visited me in Rochester, three things I showed them: The Rochester birthday cake which was Cobb's Hill at night, Rattlesnake Pete's which was excitment in the day time or at night - and the statue of Mercury.
>
> I had a sense of ownership in Mercury. My family had lived here for a half century before the statue was created. Any time, even now, when I close my eyes and visualize the skyline of Rochester the central figure is not Midtown Plaza nor the Xerox Building nor the Marine-Midland Building, not even the fast rising Lincoln Tower. It is that soul-stirring dramatic figure against the sky, Mercury the Messenger of the Gods.'" (A28)

The statue of Mercury, the perpetual lease of which is at issue in this law suit, is to the City of Rochester what the Statue of Liberty is to New York City. It is a focal point of the city skyline, it is the symbol of the city, it embodies pride and spirit, it is rightfully the treasure of all the city's people. It is inconceivable that the

City of New York could, consistent with the Constitution, laws and public policy, grant a perpetual lease of the Statue of Liberty for display by a private corporation which discriminates in employment against some city residents because of their sex. It is likewise, inconceivable, that the City of Rochester, consistent with the Constitution, laws and public policy, can perpetually lease the Mercury statue to a private employer, Lawyers Cooperative Publishing Company, which discriminates against certain citizens of the City solely because of their sex.

Defendants Gosnell and Lawyers Cooperative Publishing Company misread the complaint herein when they suggest that a cause of action for conspiracy under 42 U.S.C. 1985 (3) does not lie because corporate agents cannot conspire among themselves. Plaintiffs are alleging that the acts of all defendants, Freedman, Ryan, Gosnell and Laywers Cooperative Publishing Company are acts in concert constituting the conspiracy. The specific allegations are that:

> "36. The acts of the defendants aforesaid to lease public property, Mercury statue, to defendant Lawyers Cooperative Publishing Company are acts in concert by the defendants constituting a conspiracy by the defendants for the purpose of depriving, either directly or indirectly, the plaintiffs of equal protection of the laws or of equal privileges and immunities under the laws - namely the right of the plaintiffs as citizens to be free from the government using its power, prestige, influence or money to foster and promote

> denial of rights to females by aiding directly or indirectly an entity which discriminates against females.
>
> 37. The aforesaid acts constitute a conspiracy among the defendants as well to deny the plaintiffs their rights under the law to have the City of Rochester, through its agents, defendants Freedman and Ryan herein, abide by the law guaranteeing all persons, regardless of sex, equal employment opportunities and to affirmatively assure that any entity with which they, as agents of the City of Rochester, do business, contract, lease, etc., does not engage in forbidden discrimination."(A 16,17)[1]

Defendants Freedman, Ryan, Lawyers Cooperative Publishing Company and Gosnell acted in concert, that is conspired, to complete the perpetual lease of a public treasure, Mercury Statue, to a private entity which discriminates in employment. There was not only an overt act but overt acts of the defendants to effectuate the plan; the understanding is memoralized in the lease-contract between the defendants and the defendants have performed that contract by the public display of the Mercury statue on the private property of the Lawyers Cooperative Publishing Company. The effect of this conspiracy was immediately present on its disclosure and that effect continues to date.

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[1]Defendants Gosnell and Lawyers Cooperative Publishing Company citation of Nelson Radio & Supply Co. v. Motorola Inc., 200 F. 2d 911; Dombrowski v. Dowling, 459 F. 2d 190 (7th Cir. 1972); Baker v. Stuart Broadcasting Co., 505 F. 2d 181 (8th Cir. 1974) and Morrison v. California, 291 U.S. 82 1933 are inapposite.

The perpetual public display of this public treasure by a private corporation which discriminates in employment renders meaningless on a day by day basis the obligations of the City of Rochester imposed by the Constitution, statutes, regulations, affirmative action plans and public policy, not to discriminate in employment and not to do business with, contract, lease and so forth with any entity that does discriminate. In summary, every element of a conspiracy that need be alleged has been alleged.[2]

Defendants Gosnell and Lawyers Cooperative Publishing Company are simply incorrect in citing Dombrowski v. Dowling, supra, and thereby contending that in this Circuit a party need plead and prove "state action" to sustain a claim of conspiracy for violation of one's Fourteenth Amendment rights under §1985 (3). This court in Weise v. Syracuse University, 522 F.2d 397 (2nd Cir 1975), 10 EPD ¶10,294, reiterated that there is no state action requirement for a §1985 (3) claim, citing Griffin v. Breckenridge, 403 U.S. 88 (1971).

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[2]Defendants Freedman and Ryan seem to suggest in their brief that some specific intent of the defendants to discriminate need be shown. As noted in plaintiffs' brief, page 38, footnote 1, there is no such requirement of willful or specific intent as an element of a §1985 (3) claim. Defendants Freedman and Ryan are responsible for the natural and reasonable consequences of their acts. However, a specific intent to violate plaintiffs' rights by the lease-contract is present in light of the defendants' disregard of their acknowledged, written obligations to police all contracts and leases, and the like as set forth in the City of Rochester affirmative action materials. See Appendix B of plaintiffs' brief.

Even if defendants were correct in asserting that state action be shown in a §1985 (3) law suit, such state action is present. The City of Rochester by its agents Freedman and Ryan, have become joint participants in the discrimination of Lawyers Cooperative Publishing Company discrimination by the lease-contract agreement. Even minimal interaction between a public official and a private party constitutes the acts of the private party to be state action. See plaintiffs' brief and cases cited, pages 40-42. The Supreme Court in Griffin v. Breckenridge, supra, postulating what might need be shown if indeed there were a state action requirement of a §1985 (3) claim noted that "interference with or influence on state authorities" would meet such requirement. Griffin v. Breckenridge, supra at 98. This court in Weise v. Syracuse University, supra, underscores that in evaluating the acknowledged state action requirement of a §1983 claim, the court will require less showing of state action where the claim is one of invidious class-based discrimination on account of sex.

The Supreme Court in Griffin v. Breckenridge, supra,

found that a §1985 (3) claim is stated when there is allegation of "...class-based invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at deprivation of the equal enjoyment of rights secured by the law to all." Griffin v. Breckenridge, supra, at 102. The court at footnote 9 observed that it was not necessary to decide whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under §1985 (3). However, since Griffin v. Breckenridge, supra, the Court, in a series of cases, for example, Fontiero v. Richardson, 411 U.S. 677 (1973), Reed v. Reed, 404 U.S. 71 (1971), has found sex discrimination to be violative of one's guarantee to equal protection of the laws. This court in Weise v. Syracuse University, supra, has described sex discrimination in employment in the same language the Supreme Court descrbied the §1985 (3) requirement - invidious class-based discrimination. See also Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974). The claim of sex discrimination is the kind of class-based invidiously discriminatory animus which is sufficient for claim pursuant to §1985 (3).

In discussing state action defendants ignore the natural consequences of their acts and then suggest that there is no "nexus" between the lease-contract and the discrimination. For example, defendants Freedman and Ryan,

at page 9 of their brief suggest that "The statue cannot be used to publish or sell law books." The statue has been and will continue to be used for exactly that, as well as other purposes. The lease-contract for Mercury is part of Lawyers Cooperative Publishing Company's effort to reconstruct its public image in light of the proceedings relating to the charges of company-wide, class-wide employment discrimination. The company sought and received the imprimatur of "City of Rochester approved" with this lease-contract

The City of Rochester by the lease-contract underwrites, facilitates and enforces the employment discrimination of Lawyers Cooperative Publishing Company. The city not only had an opportunity to directly control Lawyers Cooperative Publishing Company's employment practices by virtue of this opportunity for the lease-contract, but the City of Rochester had an affirmative duty, pursuant to statute, law, regulation, public policy and affirmative action plans to examine the company's employment practices and not to execute the contract unless those practices were lawful. By its inaction when action was compelled, the City of Rochester has condoned, aided and established the company's discrminatory acts. The lease-contract here constitutes the same impermissible interdependance between private discriminator and public body and/or official as was found unconstitutional

in Burton v. Wilmington Parking Authority, 365 U.S. 721 (1961).

In any event defendants' argument that there need be a precise causal relationship between government aid to a private entity and the continued existence of the private entity is incorrect. As the Supreme Court observed in Norwood v. Harrison, 413 U.S. 455, 465, 466 (1973), "...the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to the private school and the continued well-being of that school". Or as the court observed in Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974), all that need be shown is a symbiotic relationship between the government entity and the private party charged with discrimination; there need be no showing of a direct nexus between the aid and the discrimination to make the governmental entity a joint participant in the illegal conduct; the court considers the overall relationship of the party charged with discrimination and the governmental entity. Rackin v. University of Pennsylvania, supra at 1003.

A discussion of "nexus" and an argument that government must be involved in the private discrimination directly by way of aid is, moreover, entirely irrelevant in the context

of contract compliance policies. Defendants ignore the statutes, regulations and the affirmative action documents of the City of Rochester which bind the City in all instances not to do business with any private entity that discriminates. Defendant Freedman in the introduction to the City of Rochester affirmative action program explains that federal state and local legislation, executive orders as well as court decisions mandate the policy. The City's policy requires non-discrimination clauses in all bid documents, all contracts and leases and the agreement of contractors, lessors, vendors and suppliers to abide by all state and federal equal employment opportunity laws and regulations and to submit documentation of that compliance. (See City of Rochester, New York Affirmative Action Plan, Appendix B, plaintiffs' brief, introduction and page 11.)

Applying the policy of contract compliance does not involve any analysis whatsoever of whether a government contract with a private entity will aid in any significant degree a particular discriminatory policy. The dictates of the contract compliance policy are that there shall be no business with private entities that discriminate because that business, by definition, aids the continuance of discrimination, either directly or indirectly.

Comparing the contentions of the defendants with those of the plaintiffs in the respective briefs, confirms one

conclusion. All material facts in issue between the parties are in dispute. The court below erred in granting summary judgment.

Defendants build their arguments on the bald, unsupported assertion that "No public funds have been nor will be expended in the repair and public display of the statue of Mercury, nor does the Lease involved herein create any financial obligation of any kind for the City of Rochester." (A117) That assertion by defendants Freedman and Ryan has always been disputed by the plaintiffs. As plaintiffs observed in their affidavit of November 13, 1974, "Such statement leaves unanswered the question of whether public funds have been expended and are being expended for the storage and transportation of the Mercury statue. The public display of this statue under the lease herein clearly creates a financial obligation of the City to furnish police and fire protection of the statue since the lease holds Lawyers Cooperative Publishing Company harmless from risk of hazard and theft." (A130) Further, the assertion that "no public funds" are involved is on its face absurd since plaintiffs allege in their complaint that the statue is worth in excess of $50,000.00. (A8) Defendants Freedman and Ryan have not disputed this allegation at all since they have defaulted in answering the complaint. Defendants Gosnell and Lawyers Cooperative Publishing Company admit

the allegation in their answer. (A155)

Plaintiffs attempted to test the assertion that no "public funds" were or are involved in the transaction by promptly noticing defendant Freedman for oral deposition and requiring him to produce the document or documents showing the expenditures of any moneys from whatever source, from 1951 to date on (1) the removal of public property, Mercury statue from public display, (2) the transportation of Mercury statue, (3) the storage of Mercury statue, (4) the public display of Mercury statue by Lawyers Cooperative Publishing Company and also requiring the production of any bill or statement, from 1951 to date, on (1) removal of the Mercury statue from public display, (2) the transportation of Mercury statue, (3) the storage of Mercury statue, (4) the display of Mercury statue by Lawyers Cooperative Publishing Company.(A170) Defendant Freedman failed to appear for the duly scheduled deposition; thereafter defendants Freedman and Ryan obtained a stay of all discovery pending decision on the motion to dismiss and/or for summary judgment.

Plaintiffs opposed both the motion to dismiss and the motion for summary judgment by all defendants on the ground that the court should allow completion of discovery on those issues relating to the motion to dismiss or the

motion for summary judgment in advance of the court's ruling. Defendants Gosnell and Lawyers Cooperative Publishing Company also opposed appearing for depositions and producing documents relating to expenditures of moneys in connection with the Mercury statue. The court granted the motion to dismiss and for summary judgment with these facts in dispute between the parties.[3] (A179-239)

Defendants devote pages to suggesting that the issue of whether Lawyers Cooperative Publishing Company discriminates in employment is in dispute. Plaintiffs have always suggested that this issue is in dispute and that the allegation that the company discriminates is one of those allegations that plaintiffs will prove on trial. Plaintiffs have illustrated the probability of their success by showing with their pleadings some documentary evidence of that discrimination and explaining the impact viewing that evidence has had on other agencies or bodies charged with some aspect of determining whether employment discrimination exists - New York State Division of Human Rights finding of probable cause, Equal Employment Opportunity

[3]There is no basis for the extention of the "no public funds" argument by defendants Lawyers Cooperative Publishing Company and Gosnell at page 16 of their brief. The assertion that there were "no public funds" involved does not necessarily mean that there were no federal tax dollars involved. In fact, the other inference can be drawn from the lease-contract which leaves the City responsible for police and fire protection. Both Law Enforcement Assistance Administration funds and Revenue Sharing funds have been used in Rochester for financing police protection.

Commission determination of general public importance, Defense Department Defense Supply Agency investigation and insuance of show cause letter. (See plaintiffs' brief pages 24- 26).

This action is no mere carbon copy of other actions which some of the plaintiffs have pending before the New York State Division of Human Rights or the federal court, pursuant to Title VII of the Civil Rights Act of 1964. The issues in this law suit as well as parties in this law suit are different from issues and parties before the Division of Human Rights or the federal court in the Title VII litigation. Some of the proof in the employment discrimination case may be the same as would be offered in this case as it relates to establishing discriminatory employment practices, but it is only in this case that the question of the legality of the lease-contract for the display of Mercury is an issue.

Finally, defendants Freedman and Ryan's arguments that the lease-contract conforms with legal requirements for its execution are errorneous. Contrary to what these

defendants suggest, the City affirmative action plan applies to the lease-contract since the plan in Article XV covers both contracts and leases. (See Appendix B page 11.) New York State Labor Law §220-e applies to employment practices in general as well as those on a specific project because the contractor must promise to comply with the provisions of Sections 291-299 of the Executive Law of the State of New York. (See Appendix A of plaintiffs' brief and regulation cited therein.) Section 24-1 of the Rochester Municipal Code deals not only with "agreements and orders for the procurement or sale of supplies or services" as the defendants suggest but also with awards, notices of award, letter contract, purchase orders, leases, rentals and bills of sale and also with all public works, excess property and surplus property. In summary, defendants Freedman and Ryan are very much mistaken in setting forth the provisions of the city ordinance in their brief and in discussing the application of the city laws to this case. Admittedly, the defendants made no attempt to comply with any of the requirements set forth and the plaintiffs have stated sufficient claims that the lease-contract is void.

For these reasons, and for the reasons previously set forth in plaintiffs' brief, plaintiffs respectfully

request that the court reverse the lower court's dismissal of the complaint herein and its granting of summary judgment. Plaintiffs request that this court find plaintiffs' complaint as to all counts and as to all defendants sufficient as a matter of law, that the court remand this case directing that plaintiffs be given full opportunity under the Federal Rules of Civil Procedure for appropriate discovery, that the court direct further proceedings on the application for preliminary injunction and the court direct that there be a trial of the case on the merits.

Respectfully submitted,

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December 11, 1975

CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief of plaintiffs-appellants was served on the defendants-appellees by my causing two copies thereof to be mailed to Louis N. Kash, Esq., Corporation Counsel, City of Rochester, Joseph A. Regan, Esq., of Counsel, City Hall, Rochester, New York 14614 and two copies to be mailed to Nixon, Hargrave, Devans & Doyle, John B. McCrory, Esq., of counsel, Lincoln First Tower, Rochester, New York 14614 attorneys for defendants-appellees this 12th day of December 1975.

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December 12, 1975.